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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 720

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law and opinion of the district court denying petitioners' motion for a preliminary injunction (R. 70–76) are not reported. The opinion of the district court granting petitioners' motion for summary judgment in part (R. 2–15) is reported at 128 F. Supp. 266. The majority and concurring opinions in the court of appeals (Pet. 37–50) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1955 (Pet. 51). A petition for rehearing was denied on January 27, 1956. The petition for a writ of certiorari was filed on February 29, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether railroad companies may enjoin the Postmaster General from conducting an experimental program for the limited air carriage of three-cent mail normally carried by rail or other surface means of transportation, where the experiment (1) was necessitated by the railroads' continuing withdrawal from service of mail-carrying trains, (2) was undertaken for the additional purposes of enabling the Post Office Department to acquire valuable experience for overcoming sudden disruptions of communications in times of national emergency, and (3) was designed to obtain other data needed to determine whether air transportation may be cheaper as well as faster than surface transportation.

STATUTE INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 25–26.

STATEMENT

Petitioners, five railroad companies, operate in California, Oregon, and Washington (R. 17). In October 1954, the Postmaster General announced that an experimental program for transportation of certain three-cent mail in air carrier excess cargo space would be instituted between various cities in those three states (R. 17, 48). The following month, petitioners filed this suit in the United States District Court for the District of Columbia to enjoin the Postmaster General from conducting the West Coast experiment (R. 15–19).

This experiment, like three others in the eastern United States, is an integral part of the Post Office Department's "plans for making the most efficient and economical use of all modern forms of transportation and for bringing the postal service abreast of recent far-reaching changes in the pattern of transportation" (R. 44). The experimental use of air carrier surplus cargo space for transportation of three-cent mail implements these general plans by serving two specific objectives:

> (1) The experiment will enable the Post Office Department to "gain valuable experience for effectively meeting sudden dis-

ruptions of communications in times of national emergency." [R. 45, 47.] [1]

(2) The experiment will furnish the data necessary to determine whether air carriage of three-cent mail will "provide the public with a more efficient and expeditious service at a cost comparable to or lower than the cost of surface transportation exclusively." [R. 45.]

One other important factor emphasized the need for the experimental program. The great bulk of rail-transported mail is carried, as petitioners concede, in passenger trains (R. 22; Pet. 6). But there has been a "continuing withdrawal [by the railroads] from service of passenger trains," and an ensuing "lack in many areas of adequate rail facilities" for mail carriage (R. 44). Thus, while there were over 19,000 trains used to transport domestic mail in 1925, only 5,000 trains were available in 1953 (R. 56). This continuing withdrawal and the accompanying "substantial deterioration of the mail service"

[1] In explaining the reasons for the experiment, the Postmaster General pointed out: "It is conceivable today that in a time of national emergency substantial areas could be rendered inactive through military means. Therefore, it was obvious to us that it was important that we get some experience in the handling of mail by air, which might be the only means we could use for an indefinite period of time under certain conditions. It was also highly desirable that the carriers themselves have that experience that is so necessary." Hearings on 1956 Treasury-Post Office Department Appropriations before Subcommittee of House Committee on Appropriations, 84th Cong., 1st Sess., p. 51, Feb. 16, 1955.

have "in recent years [been] the postal service's most pressing problems" and have "compelled the Department to seek additional modes of transporting the mail" (R. 44, 45, 56). As explained by the Postmaster General to Congress, the experimental air carriage was inaugurated "because * * * the constantly reduced mail-carrying trains [made] it an absolute physical necessity to do something to continue to provide the service that we had enjoyed before, as well as to improve it." Hearings on 1956 Treasury-Post Office Department Appropriations before Subcommittee of House Committee on Appropriations, 84th Cong., 1st Sess., p. 73, Feb. 16, 1955.

The nature of the service planned for air carriage of three-cent mail under the experimental program is entirely different from the traditional, high-priority air mail service for which a six-cent air mail postage is collected (R. 74).[2] The latter air mail service remains "the premium service offered by the Post Office Department" to

[2] The Post Office Department has provided the public with an air mail service since the advent of air transportation (Air Mail Act of 1925, 43 Stat. 805). Although not entitled to special delivery, the air mail service is the most expeditious mail service available and assures the user not only that his mail will receive the most rapid means of transportation, surface or air, but also that it will be given top priority treatment from the initial handling in the post office of origin to distribution at the post office of destination (see 16 F. R. 9568; JA 53–55). It is this air mail service for which the user pays a postage rate of six cents per ounce (62 Stat. 1261, 39 U. S. C. 463a).

provide expedited handling, transportation, and distribution on a strict "priority traffic" basis (R. 54). On the other hand, the three-cent letter, under the experimental program, does not receive the guaranteed high-priority, expedited service accorded air mail. Instead, it receives ordinary handling and distribution, as in the past, and is moved by air carriers only when they have sufficient empty space after all other traffic, including air mail, has been accommodated (R. 54–55). Thus, the sender who pays first class postage does not get six-cent or "real air mail service" (Pet. 45). His three-cent letter may or may not move by air, because the "air carrier is not required to carry the mail on which such postage has been paid but may do so voluntarily if he has cargo 'space available' on his plane after all other traffic is first accommodated" (R. 55, 81). Even if there is space and the three-cent letter starts to move by air, it may do so for only part of the distance the letter must travel (R. 55).

With respect to the experimental program on the West Coast, the Civil Aeronautics Board, on November 9, 1954, consistent with the special conditions prescribed for the movement of first class mail by aircraft on a non-priority, space-available basis, proposed a temporary rate of 19 cents per ton mile to be paid carriers for moving such mail (R. 52, Exhibit 16). This rate is "far below the lowest existing rate, 45 cents per

ton mile, for the usual top priority air mail service" (R. 49).[3]

Sixty-nine railroads, including the present petitioners, sought to intervene in the rate proceeding which led to the Board's order of November 9, 1954, alleging, *inter alia,* that the Postmaster General had no authority to tender three-cent mail for carriage by air and that, therefore, the Board should not fix rates for the experimental service (R. 52, Exhibit 16). The Board, rejecting the railroads' contention that "the Board has no authority to fix compensation for the non-obligatory transportation of mail on a space available basis," denied the railroads' motion to intervene for the purpose of fixing a temporary rate but granted them leave to intervene in the proceeding to determine a final rate[4] (R. 52, Exhibit 16; R. 74).

Petitioners did not attempt to appeal from the Board's action, but filed the instant suit to enjoin the Postmaster General from conducting the West Coast experiment (R. 15–19). The district court, finding the facts summarized above, concluded that the plaintiff railroads "are objecting,

[3] Comparable rates, ranging from 18–20 cents per ton-mile, were fixed by the Board for the East Coast experiment (R. 49).

[4] In addition, the Board, while not passing directly on the question, indicated that it was persuaded as to the Postmaster General's legal authority to conduct the experiment (R. 52, Exhibit 16).

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in effect, to the fact that the Postmaster General is dealing with their competitors instead of with them. In the circumstances their standing to sue is questionable" (R. 75). In addition, the district court, recognizing that the experimental service is "clearly distinct from the traditional, high priority" six-cent air mail service, expressed "grave doubt as to whether" mail subject to the experiment constitutes "air mail" in the sense used in the statutes requiring six cents postage (R. 74, 75). Accordingly, the district court denied petitioners' motion for a preliminary injunction (R. 76).

Both sides then moved for summary judgment (R. 76, 82). Another division of the district court denied the Postmaster General's motion for summary judgment and the railroads' motion for a permanent injunction, but granted, in part, the railroads' motion for summary judgment, ruling "that the prolonged experimental transportation of first-class mail by air on the West Coast is beyond the authority of the Postmaster General" (R. 1).

On cross appeals, the court of appeals ordered the judgment of the district court vacated and remanded the case with instructions to grant the Postmaster General's motion for summary judgment (Pet. 47). The court ruled that while petitioners had standing to challenge the legality of the experiment, the Postmaster General had statutory authority to conduct it (Pet. 41, 47).

Judge Bastian concurred in the result and in the court's holding that the Postmaster General has authority to conduct the experiment. In addition, he expresed his doubts "as to the standing of the railroads to sue" (Pet. 47).

ARGUMENT

Petitioners, in seeking review of the decision below, urge two reasons. Their basic contention is that the court below erred in holding that the statutory provisions which vest authority in the Postmaster General over the administration of the postal service are broad enough to authorize the experimental program (Pet. 9, 46). Additionally, petitioners contend that the diversion of mail from rail to air under the experimental program has resulted in "substantial revenue losses to the railroads," and that this may impair passenger train service, which may, in turn, become inadequate for the movement of troops in time of national emergency (Pet. 5, 6–7). Neither contention, as we show below, has merit. Moreover, established rulings of this Court foreclose petitioners' standing to sue and thus furnish an independent basis for the denial of their claims. We accordingly submit that further review by this Court is unnecessary.

1. The holding below that the Postmaster General has statutory authority to conduct the experimental carriage of three-cent mail by air is firmly supported by the unambiguous language

of R. S. 3965, 39 U. S. C. 483, *infra*, p. 25. That statute declares:

> The Postmaster General shall provide for carrying the mail on all post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.

No broader or more emphatic language could have been employed in vesting complete discretion in the Postmaster General to use any "post roads" he "may think proper" for the transmission of mail. And, in apparent anticipation of attempts, like petitioners', to restrict the comprehensive scope of the Postmaster General's authority, Congress, in 1938, expressly redefined "post roads" for the sole purpose of expanding that term to include "all air routes which are now or hereafter may be in operation." Act of June 23, 1938, 52 Stat. 1027, 39 U. S. C. 481. Congress thus made clear the Postmaster General's plenary authority to use any means of transportation for carriage of the mail, including the airlines, whenever "he, having due regard to productiveness and other circumstances, may think [it] proper."

The Postmaster General's determination to institute the experimental air carriage program leaves no room for doubt that he conformed to the statutory criteria and gave "due regard to productiveness and other circumstances." As already noted, the need for the experiment was

in large part caused by the railroads' continuing withdrawal of mail-carrying trains from service. To avoid further deterioration of postal service, it became "an absolute physical necessity" to turn to other modes of transportation. See *supra*, p. 5. Furthermore, the Postmaster General's decision was based on the need to obtain data to determine whether air carriage of three-cent mail might be used to provide the public with more efficient and expeditious deliveries at a cost comparable to or lower than that of surface transportation exclusively. Finally, the decision took into account another very significant circumstance—the need for gaining experience to overcome sudden disruptions of surface and other communications in time of national emergency. In view of the Postmaster General's consideration of these circumstances, his decision to conduct the experiment was plainly a proper exercise of the discretion vested in him by the broad language of R. S. 3965 and the 1938 amendment.

Those statutory provisions, standing alone, thus furnish abundant authority for the experiment. Further confirmation is provided by the Civil Aeronautics Act. That Act, without any limitation, authorizes the Postmaster General to tender all mail to certificated air carriers "to the extent required by the Postal Service." 52 Stat. 994, 49 U. S. C. 485 (g). And the same Act authorizes the air carriers to transport such "mail whenever required by the Postmaster General." 52 Stat.

987, 49 U. S. C. 481 (m).[5] Thus, under the Civil Aeronautics Act, the Postmaster General is authorized to tender any mail for movement by air—and the airlines are authorized to carry such mail—to the extent required by the postal service. Here, as already shown, the Postmaster General has determined that the needs of the service require the experimental air carriage of three-cent mail.

Notwithstanding the broad authority vested in the Postmaster General by R. S. 3965, the 1938 amendment, and the Civil Aeronautics Act, petitioners contend that the Postmaster General may

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[5] The word "mail" in these two sections of the Civil Aeronautics Act embraces all classes of mail and not "six-cent" air mail alone since the word is defined as "United States mail and foreign-transit mail." 52 Stat. 979, 49 U. S. C. 401 (23). The legislative history shows that prior drafts had limited the term "mail" to mail prepaid at rates of postage for air mail, but this provision was changed to eliminate that restriction. H. R. 5234, 75th Cong., 1st Sess., and S. 2, 75th Cong., 1st Sess., considered in March and April 1937, contained the limited definition. In 1938, S. 3760, 75th Cong., 3d Sess., was drafted; it defined mail in a broad way, not limited to surcharged mail. Other bills thereafter used this broad definition, which was later incorporated into the Act. Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234, 4652, 75th Cong., 1st Sess., p. 2 (1937); Hearings before Senate Subcommittee on Interstate Commerce on S. 2, 1760, 75th Cong., 1st Sess., pp. 9, 21 (1937); Hearings before House Committee on Interstate and Foreign Commerce on H. R. 9738, 75th Cong., 3d Sess., p. 4 (1938); Hearings before Senate Subcommittee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess. (1938).

tender for air carriage only mail bearing a six-cent stamp. The short answer to this contention is that no such limitation appears in R. S. 3965, the 1938 amendment, or the Civil Aeronautics Act. The language of those provisions clearly includes air carriage of all mail, whether a three or six-cent stamp is affixed. It is true, as petitioners argue, that the rate of postage on domestic air mail is six cents an ounce. 39 U. S. C. 463a. But that rate simply means that the Postmaster General may not charge a private citizen more than six cents on mail earmarked by the private citizen for air transportation. It certainly does not mean that where three-cent mail is tendered by the private citizen and, therefore, not earmarked by him for air transportation, the Postmaster General is precluded from using air transportation if it should be available and is no more costly to the postal service than would be train transportation.

Furthermore, petitioners' argument overlooks the purpose of the six-cent rate. As noted by the court below:

> * * * The obvious purpose of imposing the higher rate of postage for "air mail" was to insure revenue proportionate to higher costs. Real air-mail service, for which the higher rate is charged, involves many priorities, and they are costly. The carriers must transport this mail on an imperative priority basis. Nothing in the

> record suggests that the mere means of transportation, air as compared to rail, would justify the surcharge. Indeed, so far as the record indicates, the variation in cost between carriage by rail and carriage by air on a non-priority, space-available basis is not substantial. We think the special surcharge for "domestic air mail" implies a special service. * * * [Pet. 45.]

The record further establishes that the three-cent mail carried under the experimental program does not get this "special" or guaranteed high priority service. Instead, it receives ordinary handling and distribution and is moved by air carriers only when they have sufficient space (*supra,* p. 6). The six-cent mail rate, therefore, has no bearing on the experimental program involved in this case and in no way detracts from the Postmaster General's broad statutory authority to conduct the program.

Congressional approval of the program also confirms the view that it is authorized under existing statutes. As pointed out by the court of appeals, the experimental program has been approved by Congress, which has been kept fully advised of the program since its inauguration (Pet. 46). During the hearings on the appropriation act for the Post Office Department for the fiscal year ending June 30, 1955, the Post Office Department informed the House and Senate Committees on Appropriations concerning the

experimental mail service.[6] Upon receiving this information the Committees, far from limiting the program or questioning its legality under existing statutes, showed great interest in its continued operation and expansion. The Senate Committee stated:

THREE-CENT AIRMAIL

> The committee has been informed by the Post Office Department that the transportation of 3-cent mail by air between Washington and Chicago; New York and Chicago and certain points in the South is being handled at no greater cost than surface transportation. The opinion rendered

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[6] At the hearings before the Senate Committee on Appropriations, the Postmaster General made the following statement:

"Mr. SUMMERFIELD. * * * you already know about the experiment in the carrying of regular 3-cent mail by air. More than 2½ million letters of regular mail are flown every day on planes traveling between New York and Chicago and between Washington and Chicago, and as a result, service is expedited by many hours. When we are satisfied that this experiment is successful from the point of view of both cost and service, we shall extend it."

Hearings before the Senate Subcommittee on Post Office Appropriations on H. R. 7893, 83d Cong., 2d Sess., pp. 25–26 (1954). See also Hearings before the House Subcommittee on Post Office Appropriations on H. R. 7893, 83d Cong., 2d Sess., pp. 6, 40, 95, 253 (1954).

This program was again fully discussed at the Hearings on 1956 Treasury-Post Office Department Appropriations before Subcommittee of House Committee on Appropriations, 84th Cong., 1st Sess., pp. 50–55, 65–66, 69, 72–74, 160, 168–169 (1955).

by the Comptroller General with respect to this experimental phase of mail transportation was largely centered around transportation at no greater cost and no degree of loss in the regular 6-cent airmail field. *The committee respectfully requests the Post Office Department to render a report to this committee, not later than 60 days after the passage of this act and thereafter at quarterly intervals, which will show the full and complete cost of transporting 3-cent mail by air, including clerical and ground costs, as well as the comparative cost of surface transportation between these same points. The report shall also contain the Postmaster General's observations and recommendations with respect to the extent of expansion feasible in the carriage of 3-cent mail by air.*

The committee has placed a provision in the bill, which will require the Post Office Department to submit quarterly reports on the major changes in the postal transportation field. [Sen. Rep. No. 1286, 83d Cong., 2d Sess., 5 (1954). Emphasis added.]

When the Post Office appropriation bill was considered on the floor of the House, Mr. Canfield, Chairman of the House Committee on Post Office Appropriations, discussed the Postmaster General's program for improving the postal service. The program for carrying three-cent mail by air was specifically approved as one of the far-reaching steps taken to improve the postal

service and one which the "committee has wanted done in the post office for many years." Mr. Canfield stated:

> Last year * * * our committee requested and received the wholehearted support of the House in giving the Postmaster General the *funds* and *flexibility* that he asked in order to permit him to carry out his program to improve the service and * * * reduce the postal deficit. * * * I am happy to tell you that he has kept his promises. * * * Ninth. All means of transportation are being used as *flexibly* as possible to give patrons better service with less cost to the Department. *The carrying of regular 3-cent mail by air is under experimentation.* * * * This is a great program of reorganization and *it is exactly what our committee has wanted done in the post office for many years.* [100 Cong. Rec. 2011–2012 (February 18, 1954). Emphasis added.]

In enacting the transportation appropriation for the Post Office Department, Congress inserted a proviso that the—

> * * * Post Office Department *shall* report not less than once every three months to the Committees on Appropriations of the Senate and House of Representatives all substantial transportation changes, such report to include the *total cost of the eliminated and replacement service for airline, truck, and railroad transportation.* [Act of May 28, 1954, 68 Stat. 148 (Public Law

374, 83d Cong., 2d Sess.). Emphasis added.]

This is the provision referred to in Senate Report No. 1286, which was inserted by the Senate Committee. This provision again expressly recognizes the program and constitutes additional congressional ratification of it. The Postmaster General has filed and will continue to file reports concerning the program.[1]

Under long-settled authority, appropriation of funds in these circumstances manifests congressional approval and provides confirmation of the Postmaster General's authority to conduct the program under existing statutes. *Fleming* v. *Mohawk*, 331 U. S. 111; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 147; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 301; *Mitchell* v. *United States*, 267 U. S. 341, 345; *Wells* v. *Nickles*, 104 U. S. 444, 447.

2. Petitioners' suggestion that this case is of pressing importance and thus warrants review is predicated principally on the allegation that the experimental program is detrimental to the "financial well-being" of the railroads because of the "substantial revenue losses to the railroads"

[1] The Committee on Post Office and Civil Service of the House of Representatives has also specifically recognized the significance of the present program. H. Rep. No. 2278, 83d Cong., 2d Sess. (1954); H. Rep. No. 2619, 83d Cong., 2d Sess. (1954).

already caused by the program (Pet. 5). Even if this allegation had factual support, we seriously doubt that it would confer standing to maintain the instant suit. *Infra*, p. 23. In any event, the record establishes that the amount of mail diverted under the Postmaster General's experimental program "from railway common carriers to air facilities is relatively small in relation to the total volume of mail being transported by rail" (R. 62).

Thus, the estimate by the five petitioners that they will lose $850,000 annually as a result of the program (Pet. 6) represents "approximately 1.23 per cent of the total mail revenues of such carriers amounting to approximately $64,800,000 based on mail revenues for the calendar year 1953" (R. 63). Moreover, when compared with the total revenues of the five petitioners for 1953, the estimated loss resulting from the diversion of mail under the program "would amount to approximately four-hundredths of one per cent" of the total 1953 revenues (R. 63).

Even when viewed on a nationwide basis, the estimated annual loss of $2,000,000 for all rail carriers (Pet. 5) amounts to less than one per cent of the total revenues received by the railroads for carrying mail. The colloquy between Congressman Passman and the Postmaster General in the hearings on the 1956 appropriations highlights this factor:

Mr. PASSMAN. Has the use of the airlift for first-class mail had any appreciable effect on airmail revenues?

Mr. SUMMERFIELD. No; it has not had any appreciable effect on the revenue from regular airmail.

* * * * *

Mr. PASSMAN. Would it be possible for you to furnish for the record the amount of money paid railroads on an annual basis for moving mail?

Mr. SUMMERFIELD. Yes. I have those figures with me—$318 million was paid to the railroads in 1954.

Mr. PASSMAN. And what did you pay for the airlift for the same period?

Mr. SUMMERFIELD. Approximately $2 million.

Mr. PASSMAN. On a percentage basis, what percentage of the amount paid to the railroads is going to the airlift?

Mr. SUMMERFIELD. Eight-tenths of 1 percent.

* * * * *

Mr. PASSMAN. I am wondering why the railroads became so exercised over it when the amount you are paying for this superb airlift service is so small percentagewise. [Hearings on 1956 Treasury-Post Office Department Appropriations before Subcommittee of House Committee on Appropriations, 84th Cong., 1st Sess., p. 73, Feb. 16, 1955.

In light of these relatively minor rail-mail revenue reductions, there would seem to be no

basis for petitioners' fears that the program will force mail-carrying passenger trains out of service to such an extent that our national defense will be jeopardized. Indeed, to the extent that the record reveals any potential danger to the national defense, it shows that the discontinuance—rather than the prolongation—of the experimental program will adversely affect defense measures. For, as already noted, one of the chief reasons for the experimental program was to gain vital experience for overcoming sudden disruption of surface communication in time of national emergency (R. 45; *supra,* p. 4, note 1). Interference with the progress of the experiment would, of course, make that experience unavailable.

Moreover, the record shows that a sharp reduction in passenger service had developed before the institution of the experimental program. The experimental operation itself resulted directly from the inadequacies of rail service (*supra,* p. 4). In 1925, there were 19,404 trains used to transport the mails (R. 56). By 1953, when the Department found it necessary to make use of the airlines to carry three-cent mail on an experimental basis, the number of trains available had dropped to approximately 5,000 (R. 56). It was this "substantial decline" which "compelled the [Post Office] Department to seek additional modes of transporting the mail" (R. 56).

Petitioners further assert that they must maintain in stand-by readiness all of the facilities and services that may be required to move the first-class mail now being carried by the airlines (Pet. 6). But here, too, the record does not substantiate the assertion. To the contrary, the record shows that the Post Office Department

> * * * neither requires the railroads to maintain or to establish passenger trains solely for the transportation of United States mail, nor requires the railroads to operate passenger trains on schedules established particularly for the transportation of United States mails. Instead, the Department limits its requirements for transportation insofar as train schedules are concerned to the transit time maintained by railway common carriers for their general transportation business in connection with their published schedules. Consistent with such postal requirements and the other primary services performed by railway common carriers, the establishment of passenger trains and their operating schedules are primarily accommodated to the requirements of their passenger services. [R. 57.]

Moreover, the Post Office Department's requirements in connection with the transportation of United States mail by railroad in no way prevent the rail carriers from "diverting any railway post office equipment formerly used to provide the services which have been discontinued on the

West Coast to other railway post office lines where there is a need for reasonably modern and adequate railway post office equipment or from converting such equipment to other rail purposes" (R. 65).

3. In addition to the correctness of the holding below on the merits (Point 1) and the lack of factual support for petitioners' attempted showing of importance sufficient to warrant review (Point 2), there is a third and independent reason militating against the grant of certiorari. Petitioners, we believe, lack standing to sue.

Fundamentally, what is involved here, as noted by the district judge in denying petitioners' motion for a preliminary injunction, is an objection by the railroads "to the fact that the Postmaster General is dealing with their competitors instead of with them" (R. 75). This Court has consistently ruled that similar claims are insufficient to give plaintiff competitors standing to sue. See, *e. g., Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 478; *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118; see, also, *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (C. A. D. C.), certiorari denied, 350 U. S. 884, and Judge Bastian's concurring opinion in the instant case, Pet. 47. Under these consistent rulings, the investments made by the railroads in cars and equipment—noted by the majority decision below—give the railroads no more standing than did the investments made by the power companies in the cited cases.

And those cases make it equally plain that the railroads have no more standing to sue here than did the pony express, stagecoach, and canal-boat operators, when they were supplanted by the railroads in the carriage of mail.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1956.

APPENDIX

1. R. S. 3965, 39 U. S. C. 483, provides:

> § 483. *Provisions for carrying the mail.* The Postmaster General shall provide for carrying the mail on all post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.

2. The Amendatory Act of June 23, 1938, provides in pertinent part (52 Stat. 1027):

> SEC. 1107. (a) Section 3964 [39 U. S. C. 481] of the Revised Statutes is hereby amended by adding "and all air routes", after the words "or parts of railroads".

3. The Civil Aeronautics Act provides in pertinent part:

(a) Section 405 (g), 49 U. S. C. 485 (g):

> From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder thereof, to the extent required by the Postal Service, for tranportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section.

(b) Section 401 (m), 49 U. S. C. 481 (m):

> Whenever so authorized by its certificate, any air carrier shall provide necessary and

adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 720

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Petitioners,

vs.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES,

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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The response serves to highlight the inadequacies of the opinion of the Court of Appeals and the difficulties in finding legal support for the transportation of three-cent mail by air. Respondent, though seeking to sustain the decision below, virtually abandons defense of the Court of Appeals' opinion. Instead, respondent relies primarily on the Post Roads Act, 39 U.S.C. 483, and Congressional ratification. The Court of Appeals could not accept the ratification argument (Petition, Appendix B, pp. 46-47). It was unwilling to rest its opinion on the Post Roads Act, stating that: "Standing alone this general authorization [of the

Post Roads Act] might not be persuasive." (*Id.*, at p. 46.) Respondent also contends that the two lower courts erred in deciding that petitioners have standing to sue and that, regardless of the merits, the petition should be denied on this independent ground.

Beach v. *United States*, 226 U.S. 243, 257, held that the Post Roads Act "is one of the sections that prescribe the general duties of the Postmaster-General, and cannot be fairly treated as authority for making the alleged contract of purchase" of pneumatic-tube devices for the transportation of mail. Nor can it be "fairly treated as authority" for transporting three-cent mail by air. Despite the fact that that statute has been in effect at least since 1872, 17 Stat. 309, the Postmaster General has found it necessary to request and the Congress to enact numerous statutes expressly authorizing air transportation of mail, as is set forth in the petition. Respondent admitted, before the Court of Appeals, that the Postmaster General had no authority to transport three-cent mail by air between 1934 and 1938 although the Post Roads Act was then in effect. (See Petition, p. 14.) We have shown in the petition that the enactment of the Civil Aeronautics Act in 1938 was not intended to confer this authority on the Postmaster General, and has never been thought to have done so by the Congress, or by the Post Office Department until the experimental programs were inaugurated. Respondent does not squarely rely on the Civil Aeronautics Act as conferring such authority, but merely finds "further confirmation" in that Act. Furthermore, the Post Roads and Civil Aeronautics Acts must yield to the express prohibition against the transportation of three-cent mail by air in the subsequently enacted 1946 Act, even if as an original matter they would have provided authority for the experimental programs. Respondent does not undertake to explain why the Court should disregard the plain language of that Act pre-

scribing that "the rate of postage on all" "mailable matter being transported as mail by air" "shall . . . be six cents . . ."

A few Congressmen indicated their knowledge or approval of the transportation of three-cent mail by air, but without reference to the legal problem involved. Others, including the Chairman of the Senate Committee on Post Offices and Post Roads, expressed strong objections to the program.[1] At no time, however, was any action taken by the entire Congress with knowledge that approval of the transportation of three-cent mail by air was in question. As stated by the District Court (J. A. 10): "One has to know the function of the appropriation committee and the

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[1] The Post Office and Civil Service Committees are responsible for substantive legislation involving the Post Office Department. Senator Johnston, Chairman of the Senate Post Office and Civil Service Committee, stated before the Subcommittee of the Senate Committee on Appropriations considering the Post Office Department appropriations for fiscal 1956 that:

> "In my judgment, the Postmaster General has no authority to transport first-class mail by air even on an experimental basis . . . In his previous testimony the Postmaster General . . . has given no indication of when he proposes to suspend his so-called experiment. I wish to make it clear that in my judgment the experiment has already been unduly prolonged.
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> * * * * * * *
>
> "I do not want to get into a discussion of the subject of flying first-class mail before the Appropriations Committee, as I do not think it would be appropriate, but I do want to bring to your attention the fact that there are serious questions of policy involved in any determination to provide air transportation for first-class mail that go far beyond the jurisdiction and responsibilities of the Appropriations Committee and which should be the subject of most careful study by my committee before any legislative action is considered." Hearings on Post Office Department Appropriations for fiscal 1956 before the Subcommittee of the Senate Committee on Appropriations, 84th Cong., 1st Sess., pp. 58-60.

The appropriations were adopted in the Senate without objection by Senator Johnston or any other member of the Post Office and Civil Service Committee, 101 Cong. Rec. 2688, which could hardly have been the case if ratification of the operations in question here were understood to be involved.

means by which our Congress operates to appreciate that" respondent's suggestion of ratification from a few scattered references to the program in Congressional reports and hearing "is not a tenable argument." This is particularly true where, as here, Congressional ratification would involve a repeal of an express statutory prohibition. At the very least, this Court should have the benefit of full briefs and oral argument before rejecting the conclusions of the two lower courts on this point.

Both the District Court (J.A. 13-14) and the Court of Appeals (Petition, Appendix B, pp. 39-41) held that petitioners have standing to sue under established common-law principles. We believe that those holdings are correct. Certainly, they are not so clearly wrong that this Court can decide the issue of standing adversely to petitioners without the benefit of full briefing and oral argument by the parties.

The agency action contested in this case does not merely involve the financing or creation of new competition, such as was involved in *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, and similar cases. The plaintiffs in those cases were not regulated by the United States and the contested action did not interfere with or affect any obligations imposed upon them by the Federal Government. Petitioners, on the other hand, are obligated to transport mail tendered to them by the Postmaster General and to make substantial investments in special equipment for handling and transporting such mail. 39 U.S.C. 537, 538, 539, 541, 541-1, and 563. They are dependent upon mail pay to compensate them for these required investments and services. 39 U.S.C. 541; *United States* v. *New York C. R. Co.*, 279 U.S. 73, 78. Respondent, in an order (J.A 30-31) that was "part and parcel of the experimental program for transportation of three-cent mail

by air" (Petition, Appendix B, p. 40), expressly discontinued use of certain of the special equipment which petitioners were compelled to provide.

Thus, as the Court of Appeals found, if petitioners are correct on the merits they "have been injured by a direct, illegal act." Clearly the "legal wrong" is more evident here than in *Frost* v. *Corporation Commission*, 278 U.S. 515, where the holder of a non-exclusive franchise was found to have standing to complain of the unauthorized creation of competition, or in *Pierce* v. *Society of Sisters of Holy Names*, 268 U.S. 510, 535-536, and *Truax* v. *Raich*, 239 U.S. 33, where unlawful interferences with valuable business relationships were deemed sufficient to found standing. See, also, *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 154; *Parker* v. *Fleming*, 329 U.S. 531.

Furthermore, petitioners have standing to sue under the Administrative Procedure Act. Section 10(a) of that Act, 5 U.S.C. 1009(a), provides that:

> "Any person suffering legal wrong because of any agency action, *or adversely affected or aggrieved by such action within the meaning of any relevant statute*, shall be entitled to judicial review thereof." (Emphasis supplied.)

This provision clearly was intended to broaden the category of persons who have standing to seek review of agency action beyond that category of persons permitted standing by common-law principles. Otherwise, the phrase "suffering legal wrong" would have been sufficient and the remainder of the provision would be surplusage. The legislative history of the Act indicates that the phrase "adversely affected or aggrieved" was intended to be given the construction that similar phraseology had received in *Commission* v. *Sanders Radio Station*, 309 U.S. 470, and like

cases.[2] Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 212, 276, 310-311. The *Sanders* case held that a competitor of a person granted a broadcasting license had standing to seek review of the grant, under a statute providing for judicial review at the behest of a person "adversely affected," even though he was not legally wronged by the agency action. Since the plaintiff was adversely affected in fact by the increased competition resulting from the agency action, he had standing to sue under the statutory standard.[3]

Section 10(a) of the Administrative Procedure Act, which is applicable to "any agency action" not by statute made final or committed to unreviewable agency discretion, must be read into all federal statutes providing for "agency action." Cf. *Shaughnessy* v. *Pedreiro,* 349 U.S. 48, 51; *Wong Yang Sung* v. *McGrath,* 339 U.S. 33. Respondent's regulations providing for the transportation of three-cent mail by air (J.A. 52-53) prescribe "facilities" and "service" for the carriage of mail, and thus constitute "agency action" as that term is defined in the Administrative Procedure Act. 5 U.S.C. 1001(c) and (g). The mail revenues of petitioners have been substantially reduced. Petitioners have been compelled to discontinue the use of certain special mail-transportation equipment, and their competitors have been aided by this agency action. Hence, they have been adversely affected in fact by the illegal action

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[2] E.g., *Scripps-Howard Radio* v. *Comm'n,* 316 U.S. 4; *Alton R. Co.* v. *United States,* 315 U.S. 15, 19; *Western Pac. Cal. R. Co.* v. *Southern P. Co.,* 284 U.S. 47, 51-52; *Chapman* v. *Federal Power Commission,* 345 U.S. 153; *National Coal Ass'n* v. *Federal Power Commission,* 191 F. 2d 462 (C.A.D.C.); *Seaboard and Western Air Lines* v. *C.A.B.,* 181 F. 2d 515 (C.A.D.C.); *Associated Industries* v. *Ickes,* 134 F. 2d 694 (C.A.2), vacated on other grounds, 320 U.S. 707; *Land O'Lakes Creameries* v. *McNutt,* 132 F.2d 653 (C.A. 8).

[3] One purpose of this broadening of the category of persons having standing to seek review of agency action was to assure judicial review in situations like that involved in *Perkins* v. *Lukens Steel Co., supra.* Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 368.

of respondent and are "adversely affected and aggrieved within the meaning of" the postal laws which are the "relevant statutes" governing the agency action in this case.

The District Court agreed that petitioners have standing under the Administrative Procedure Act (J.A. 13-14).[4] The Court of Appeals did not find it necessary to consider the matter since it found standing on other grounds. That court has stated elsewhere, however, that it "would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption." *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 933 (C.A. D.C.).[5] The exact effect of the Administrative Procedure Act on standing to seek review of illegal administrative action is still to be authoritatively determined.[6] The issue is of great importance because of the wide application of the Act. Decision of the issue requires careful consideration of several interrelated statutory provisions and extensive legislative

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[4] See, also, *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346, 349 (D. D.C.).

[5] In our view, some of the observations in the *Kansas City* case regarding the effect of the Administrative Procedure Act on standing are too restrictive. However, the circumstances of that case differ radically from those involved here.

[6] The Government has persistently urged a narrow reading of Section 10 of the Administrative Procedure Act. This Court, on the other hand, has emphasized that section 10 is to be given a "hospitable interpretation" in view of the Congressional purpose "to remove obstacles to judicial review of agency action." *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51; *Heikkila* v. *Barber*, 345 U.S. 229, 232. It has never accepted the view that section 10 merely codified existing law. *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474; cf., *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. The question of how far Section 10 has extended the doctrine of "standing" where unauthorized agency action has in fact adversely affected a petitioner remains an open one. The Government asserts in this connection as it did with reference to the other provisions of Section 10 that the Congress intended merely a codification of existing law. This Court's reading of the other provisions suggests that the Congress was aiming at correcting, rather than confirming, an existing situation.

history. This decision should not be made without the benefit of full briefing and oral argument by the parties.

Respectfully submitted,

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